IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

No.

FIRST TRUST & DEPOSIT COMPANY and EDITH G. BALLARD, as Executors of the last Will and Testament of WILLIAM M. BALLARD, deceased,

Petitioners,

vs.

FRANK J. SHAUGHNESSY, Collector of Internal Revenue of the United States for the 21st District of New York,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 134 Fed. (2d) 940. It is printed at pages 243-248 of the record. The Trial Judge gave no formal opinion. His informal verbal opinion appears at pages 206 to 213 of the record.

II

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the judicial code as amended by the Act of February 13, 1925.

The opinion of the Circuit Court of Appeals was filed April 8, 1943. A petition for rehearing was filed April 20, 1943, and denied April 21, 1943. The judgment of the Circuit Court of Appeals was entered April 24, 1943.

III

Statement of the Case

A summary statement of the case is contained in the petition commencing at page 4.

IV

Specification of Errors

The Circuit Court of Appeals erred:

(1) In holding that the transfers were made in contemplation of death and that the donor's condition of health and state of mind towards his death had nothing whatever to do with the case.

(2) In holding that, irrespective of the donor's condition of health and state of mind towards his death, the transfers were made in contemplation of death merely because the donor was impelled to make the transfer only by a desire to escape estate taxes on the property given.

(3) In holding that there was no question of fact to be submitted to the jury.

V

Argument

As stated in the opinion of the Circuit Court of Appeals, the only basis for including in the gross estate of Mr. Ballard the policies which he had given to his wife was that he had transferred them to her in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926 as amended.

The petitioners contend that no gift can be held as a matter of law to have been made in contemplation of death regardless of the donor's condition of health and his state of mind towards his death. An indispensable prerequisite to holding that a gift is made in contemplation of death is the finding that the gift was impelled by the thought of death. Always must all facts and circumstances which have a bearing on the donor's health and his state of mind towards his own death be considered before a decision can be reached whether or not the gift is made in contemplation of death. The rule enunciated by the Circuit Court of Appeals that in a contemplation of death case the donor's condition of health and his state of mind towards his death has nothing whatever to do with the case is novel and startling. Its decision holds squarely that a transfer can be held to have been made in contemplation of death, even though the donor was in no way influenced by the thought of death. Its decision is in direct conflict with decisions of this Court and other Circuit Courts of Appeals.

That the decision of the Circuit Court was based entirely upon the fact that Mr. Ballard was impelled to make the transfers only by a desire to escape estate taxes and not at all because he was impelled by any thought of death is clear from its opinion herein and from its opinion in the case of *Blakeslee* v. *Smith*, 110 Fed. (2d) 364.

In the opinion herein nothing is said about any thought of death being the impelling cause of the transfer. On the contrary, the Court expressly says: "The condition of Ballard's health and his state of mind towards his death had nothing whatever to do with the case."

In the case of *Blakeslee* v. *Smith* decided by the Circuit Court of Appeals, Second Circuit, in 1940, the transfer involved was an irrevocable trust made in 1929 by a man 73 years old. The trust provided that it should terminate at the end of 15 years or at the earlier death of the settlor and his wife; and upon its termination the principal should be paid to the settlor's six children. The income up to $75,000 a year (subsequently reduced to $25,000 a year) was to be paid by the trustee to the settlor and if he died during the 15-year term, to his wife; and any surplus income should be added to the corpus. The settlor died in 1933.

The Circuit Court in the Blakeslee case followed the decision of this Court in the case of *Colorado Bank* v. *Commissioner*, 305 U. S. 23, holding that a transfer is not made in contemplation of death simply because the dominant purpose was to make provision for the donees after the donor's death. After reviewing the evidence about the settlor's health and state of mind towards his death, the Court held that the gift was not made in contemplation of death and stated at page 366:

> "There being a substantial basis in the evidence for the finding that the settlor was actuated by considerations not flowing from the apprehension of death, the statute relied on is not applicable even though there was an intent to provide for the settlor's children after his death. *Colorado Bank* v. *Commissioner*, 305 U. S. 23, 59 S. Ct. 48, 83 L. Ed. 20; See also, *United States* v. Wells, 283 U. S. 102, 51 S. Ct. 466, 75 L. Ed. 867."

The *Blakeslee* case and the *Colorado Bank* case were cited by the petitioners in their briefs in the Circuit Court. It must, of course, be assumed that the Circuit Court did not in the case at bar intend to overrule the decision of this Court in the *Colorado Bank* case or its own decision in the *Blakeslee* case.

It follows, therefore, that the decision in the present case must rest entirely on the fact that a transfer is, as a matter of law, made in contemplation of death when the donor is impelled only by a desire to reduce estate taxes.

Petitioners submit that a transfer is not made in contemplation of death simply because the donor makes it to escape estate taxes. The statute does not impose taxes on a transfer made to reduce or escape estate taxes. The statute imposes taxes on a transfer made in contemplation of death. The fact that the gift was made to reduce estate taxes may be considered along with other relevant facts but standing alone it is not enough. Today countless persons are making transfers to reduce estate taxes with no thought of death in mind. An estate tax is just another tax. Ways of reducing it are thought of in no other light than ways of reducing other taxes. Each is a tax problem and nothing more. Along with the fact that a transfer was made to reduce estate taxes must be considered the donor's age, his condition of health, his business, social and family activities and all other facts relevant to his state of mind towards his death in order to determine whether the transfer was made in contemplation of death.

The Court's ruling that Ballard's condition of health and state of mind toward his death had nothing whatever to do with the case is contrary to United States v. Wells, 283 U. S. 102, 51 S. Ct. 447 and other cases.

In *United States* v. *Wells*, the Court said at page 115:

> "It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive."

at page 117:

> "As a condition of body and mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or nonexistence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death."

at page 118:

> "The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand'."

at page 119:

> "It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in 'contemplation of death,' as there can be none in relation to fraud, undue influence, due process of law, or other familiar legal concepts which are applicable to many varying circumstances. There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus to give effect to the manifest purpose of the statute."

Becker v. *St. Louis Union Trust Co.*, 296 U. S. 48, 56, S. Ct. 78.

In this case the transfer was by a trust deed. The Commissioner sought to include it in the gross estate (1) on the ground that the transfer was intended to take effect at death and (2) on the ground that the transfer was made in contemplation of death. The judgment of the Circuit Court that the transfers were not taxable was affirmed by this Court. The Court was unanimous on the proposition that the gifts were not made in contemplation of death. In its opinion the Court summarized the evidence as to the donor's health, business activities, attitude towards death, etc. It said at page 52:

> "Evidence that the decedent was in any way influenced in what he did by the thought of death, that court (Circuit Court of Appeals, 8th Circuit) said was entirely lacking."
>
> "We are unable to find anything in the record which conflicts with the statement of the court below that evidence that the decedent was in any way influenced by the thought of death was wholly lacking."

Flack v. *Holtegel* (7th Circuit), 93 Fed. (2d) 512, at page 514:

> "The grantor must contemplate death, for such is the motive which leads to testamentary devices. The question is essentially one of the state of mind of the transferor."

Estate of F. B. McGrew v. *Commissioner* (6th Circuit, decided April 12, 1943), 135 Fed. (2d) 158:

> "Since *United States* v. *Wells*, 283 U. S. 102, it has been established law that whether a gift *inter vivos* was made in contemplation of death within the meaning of the Revenue Act depends upon the dominant motive of the donor, 'in the light of his bodily and

mental condition', to be determined in each individual case from the circumstances; and that a transfer may be in contemplation of death, even though not induced by the fear that death is 'near at hand'."

The Court's ruling that, regardless of the donor's condition of health and state of mind toward his death, the transfers were, as a matter of law, made in contemplation of death because the donor was impelled to make the transfer only by a desire to reduce estate tax is in conflict with Denniston v. Commissioner, 106 Fed. (2d) 925, Third Circuit, 1939.

Denniston v. *Commissioner*, 106 Fed. (2d) 925, reversing 38 B. T. A. 1076.

In the cited case the donor, Mrs. Denniston, had in 1915 executed a deed of trust assigning certain securities to a trustee. The income was to be paid by the trustee to the donor during her lifetime. She reserved to herself a general power to appoint by her will the disposition of the property after her death. In case of failure to exercise the power of appointment, the property after her death was to go to her five children in equal shares. All five children survived her. On March 16, 1932, when she was 75 years old she relinquished the power of appointment. In May, 1932, she gave her real estate to her daughter who simultaneously executed a declaration of trust that she held the real estate for the benefit of all five children. Mrs. Denniston died March 13, 1934. As a result of her transfers she did not leave enough property to pay the estate taxes which the Commissioner assessed. The Commissioner included in her gross estate the securities and the real estate.

The Board of Tax Appeals found on substantial evidence that one of the dominant and controlling motives for the

relinquishment of the power of appointment and the transfer of the real estate was to save her estate the burden of estate taxes.

The Circuit Court of Appeals for the Third Circuit reversed.

It is to be noted that under the trust deed the donees could not make any beneficial use of the property until after the donor's death. The Third Circuit accepted as binding on it the decision of this Court in the case of *Colorado National Bank* v. *Commissioner*, 305 U. S. 23, to the effect that the fact that the donor made it impossible for the donee to use the property until after the donor's death and expected that the donee would make no use of the property until after the donor's death, does not, standing by itself, make the gift in contemplation of death.

The Court then considered the effect of the fact that one of the dominant and controlling motives of the donor was to escape estate taxes.

The Circuit Court of Appeals stated the question as follows on page 927:

> "The question remains, however, whether the fact that a transfer was made to avoid estate tax is, without any other evidence of a motive associated with death, sufficient to support an ultimate finding or conclusion that the transfer was made 'in contemplation of death', within the meaning of Section 302 of the Revenue Act."

Its answer appears on page 928:

> "We think that because in carrying out a plan to provide for her children the donor uses a method which she thinks is best calculated to save death taxes the conveyance is not thereby conclusively stamped as 'in contemplation of death'. The desire to avoid estate

taxes may be just as clearly present in the mind of a young and vigorous donor who thinks of death as far distant as in that of one who is old and feeble and who looks momentarily for its coming. Standing alone it cannot be deemed conclusive of a mental state such as is contemplated by the statutory phrase 'contemplation of death'."

* * * * *

"We think that the petitioners adequately overcame the presumption in favor of the Commissioner's ruling by the uncontradicted evidence that the policy of the deceased was to divide her estate equally among her children as is shown by the trust deed executed by her nineteen years prior to her death; that at the time of the 1932 transfers she was a vigorous, robust woman with better than average health for one of her age; and that she was planning her activities for the future without any fear of failing health or impending death."

A very clear case of conflict between different Circuit Courts of Appeal is thus presented.

The decision of the Circuit Court that there was no question of fact for the jury was erroneous and contrary to the decisions of this Court.

Petitioners contend that the question for the jury was whether the gift was made in contemplation of death. This issue has always been held to be a question of fact to be decided by the trier of the facts. In deciding it all facts relative to the donor's health and state of mind towards his death are to be considered. This is the only case which the petitioners have found where the transfer has been held, as a matter of law, to have been made in contemplation of death.

In deciding this question the jury should be permitted to consider all the evidence bearing upon Mr. Ballard's health

and state of mind towards his death. It was for the jury to weigh the relative value to be given to (1) the fact that the transfer was made to reduce estate taxes and (2) the fact that the donor modified a gift previously made which could not be used until after his death to one which could be used by the donee during the donor's lifetime.

Petitioners fail to see that the fact that a donor makes a gift to reduce estate taxes is much, if any, indication of what he thinks about the date of his death or of when he expects the donee will use the property given. On the other hand, the fact that in the trust deed the donee, Mrs. Ballard, reserved the power to revoke or to withdraw gives rise to a strong inference that both Mr. Ballard and Mrs. Ballard expected that she might use the property during the former's life. The very ease with which it could have been provided that Mrs. Ballard could not use any of the property during her husband's life is warning that a Court should not conclude, as a matter of law, that he expected that she would not use it until after he died. Mrs. Ballard testified that she knew that she could sell the policies or turn them in (R. p. 70). Furthermore, the record herein shows that the Ballard family was trust-minded and that Mrs. Ballard had great faith in her husband's bank (R. pp. 45, 66, 105). The jury would have been justified in finding that such faith was the cause of her putting the policies in the 1935 trust.

It is also to be noted that evidence of what Mr. Ballard said to Mrs. Ballard about the 1935 trust and putting the policies in it were excluded by the Trial Court on objections of counsel for the taxpayer and the government (R. pp. 45, 67-68, 70, 72-73). It is error to decide cases on questions of fact (R. p. 247), where evidence on that fact has been excluded.

Simmons v. *Swan*, 11 Fed. (2d) 267, 273 U. S. 675, 275 U. S. 113.

The cited case was an action for breach of contract. The Trial Court at the close of the case directed a verdict for the defendant. The Circuit Court of Appeals affirmed. This Court granted certiorari and reversed because as stated on page 115 of 275 U. S.:

> "A short statement of the dominant facts as they might have been found seems to us sufficient to show that the plaintiff had a right to go to the jury."

Conclusion

For the foregoing reasons, it is submitted that a writ of certiorari should issue to the Circuit Court of Appeals for the Second Circuit.

STEWART F. HANCOCK,
800 Hills Building,
Syracuse, New York,
Attorney for Petitioners.

Henry S. Fraser
Counsel for Petitioners